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In the
Supreme Court of the United States

CLARENCE BRENT HAEBERLE,
Petitioner,

v.

UNIVERSITY OF LOUISVILLE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner brought a claim pursuant to 42 U.S.C. § 1983 alleging that he was denied tenure and improperly terminated by the Respondent. The applicable statute of limitations for such a claim is one year. The Sixth Circuit Court of Appeals affirmed the dismissal of the Petitioner's claim as barred by the statute of limitations. The Court held that the limitation period began to run when the university president made a negative recommendation regarding tenure instead of when the university's board of trustees rendered its final decision on the matter. In making its decision, the Sixth Circuit misapplied the holding of *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and failed to consider state law concerning finality of actions by state universities. Instead, the court created a moving target for litigants attempting to ascertain the beginning date for the limitation period in § 1983 wrongful discharge claims. Many other appellate courts have similarly struggled to interpret and apply the holding of *Ricks*. The questions presented are as follows:

1. **Whether this Court should grant certiorari to clarify the holding of *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and announce the proper standard for determining what constitutes a final action of a state university when, in a case brought under 42 U.S.C. § 1983, a federal court has refused to consider state law regarding the issue and in doing so has misapplied the Supreme Court's holding in *Delaware State College v. Ricks*, 449 U.S. 250 (1980).**

2. **Whether this Court should grant certiorari and clarify the standard for judgment on the**

pleadings in light of the Sixth Circuit's decision to make factual conclusions not expressly stated in the pleadings when considering such a motion.

PARTIES TO THE PROCEEDINGS

Petitioner

1. The Petitioner in this case is, Clarence Brent Haeberle, an individual. Petitioner states he is not subject to the provisions of Rule 29.6 since he is not a non-governmental corporation.

Respondent

2. Respondents are University of Louisville, John W. Shumaker; Dr. Joel A. Kaplan, Carol Z. Garrison, Marie K. Abrams, Ulysses L. Bridgeman, Jr., Ann Ford Cobb, Jason T. French, Nathaniel E. Green, Dennis R. Hall, Frank B. Hower, Jr. Rose Marie Lege. Milton M. Livingston, Jessica S. Loving, William P. Mulloy, Sr., Darryl T. Owens, J. Chester Porter, T. W. Samuels, Sr., Joyce Hagen Schifano, Melissa Long Shuter, Sandra Metts Snowden, and Mary A. Yarmuth.

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Petitioner, Clarence Brent Haeberle, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 9, 2004.

OPINIONS BELOW

The U.S. District Court's Opinion granting in part the Respondent's Motion for Judgment on the Pleadings is not published (Pet. App. A). The Sixth Circuit Court of Appeals Opinion (affirming the judgment of the District Court) was not recommended for full-text publication. (Pet. App. B).

STATEMENT OF JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 9, 2004. Jurisdiction to consider this opinion from the final judgment or a decree by a case in the courts of appeals is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

The statutes involved in this petition are: 42 U.S.C. §1983, KRS § 61.805, KRS § 61.835, and KRS § 164.830. The relevant portions of these statutes are set out in Appendix C.

STATEMENT OF THE CASE

On July 1, 1987, Dr. Haeberle was hired as an Assistant Professor of Dentistry at the University of Louisville, Kentucky School of Dentistry, as a clinical instructor with the Department of Prostodontics. On October 1, 1992, Haeberle became a full-time Assistant Professor of Prostodontics at the

School of Dentistry, with the intent to remain with the University and seek a tenure position.

The University established a set of guidelines ("The Red Book"), which among other things, set forth the criteria and standards by which candidates for tenure are to be evaluated. The Red Book contains specific factors applicable to the School of Dentistry. Haeberle was fully aware of the criteria guidelines, and purposely geared his clinical teaching and scholarly activities towards fulfilling the requirements necessary to obtain tenure at the University. His work was supervised and monitored by the Department Chair and the Dean of the Dental School. Haeberle's progress towards tenure was approved by the Department Chair and Dean of the Dental School.

In August of 1998, Haeberle submitted a compendium of documents called a triptych to the Faculty Personnel Review Committee in order to be considered for promotion to associate professor with tenure. The triptych consists of a candidate's curriculum vitae, personal statement, and committee recommendations regarding application for tenure.

On September 24, 1998, the Faculty Personnel Review Committee of the University School of Dentistry voted unanimously to endorse Haeberle's promotion to the rank of associate professor with award of tenure. The Dean of the University School of Dentistry, Dr. Rowland A. Hutchison, supported the Personnel Review Committee's decision and recommended to the Vice President for Health Affairs of the University of Louisville, Joe Kaplan, that Haeberle be promoted with tenure to the position of associate professor.

Kaplan recommended that Haeberle be denied both promotion and tenure. Kaplan forwarded his recommendation

to Carol Garrison, University Provost, who is responsible for viewing triptychs and making tenure recommendations to the President of the University, who in turn makes recommendations to the Board of Trustees. Garrison recommended against granting tenure to Haeberle, as did the University's President, John Shumaker, who recommended to the Board of Trustees that Haeberle's tenure be denied and that his employment be terminated. The factors used by Schumaker, Garrison and Kaplan were in direct violation of the Red Book policies as approved by the University for the Dental School.

Following the Red Book's integrated review process, on September 7, 1999, Haeberle received a hearing from the University Faculty Grievance Committee regarding Schumaker's recommendation. The Committee recommended that Schumaker reconsider his recommendation, but he declined. In March of 2000, the Board of Trustees notified Haeberle that his tenure would be denied, and that Haeberle's employment would be terminated. The lawsuit challenging that Opinion was filed within one year of that date on December 21, 2000. Haeberle brought this claim in state court against the University of Louisville, members of its Board of Trustees, and individual officials of the University. In his complaint, Haeberle alleged violations of 42 U.S.C. §§ 1983, 1985, the Kentucky Constitution, common law Kentucky contract claims, and state tortuous interference with contract. On January 19, 2001, the Defendants removed the case to the United States District Court for the Western District of Kentucky at Louisville.

Subsequently, the University and other Defendants moved the District Court for judgment on the pleadings. Haeberle then filed an Amended Complaint alleging First, Fifth and Fourteenth Amendment claims pursuant to the U.S.

Constitution. Additionally, Haeberle asserted common law contract claims and tortuous interference claims against several of the parties.

The District Court granted the original Motion for Judgment on the Pleadings on several grounds, but reserved ruling on the Second Amended Complaint. Defendants again moved for Judgment on the Pleadings on the allegations of the Second Amended Complaint, claiming among other things, that the Petitioner's federal constitutional claims were barred by Kentucky's one year statute of limitation for actions brought under 42 U.S.C. § 1983. The Respondent based this contention on *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In its response, Haeberle noted the Defendant's misapplication of *Ricks*. Despite this, the District Court cited *Ricks* in its finding that Haeberle's § 1983 claims were time-barred.

Haeberle timely appealed the District Court's Opinion to the Sixth Circuit Court of Appeals. Haeberle again pointed out the District Court's misapplication of *Ricks*. Haeberle also asserted that *Board of Trustees v. Hayse*, 782 S.W.2d 609 (Ky. 1989) should control regarding the limited issue of when a University's action is final for purposes of the accrual of the limitations period. Instead, the Sixth Circuit Court of Appeals affirmed the District Court, finding that under *Ricks*, Haeberle's federal claims were barred by the one year statute of limitations. The Sixth Circuit questioned whether *Hayse* would apply to the statute of limitations question, and found that even if *Hayse* did apply, it undermined Haeberle's position.

In its opinion, the Court of Appeals seemingly went outside the pleadings and unilaterally determined that the University "must" have given Haeberle notice that his tenure

was denied by September 7, 1999 because that is when he received a hearing from the University Faculty Grievance Committee. However, the record conclusively demonstrates that the Board of Trustees did not notify Haeberle until March of 2000 that his tenure was denied and that his employment would be terminated. This Petition for Writ of Certiorari followed.

In this matter, the U.S. District Court for the Western District of Kentucky had jurisdiction under 28 U.S.C. §§ 1331, 1441 and 1446(b). Likewise, the Sixth Circuit Court of Appeals had jurisdiction over Haeberle's appeal pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The Petition should be granted for the following reasons:

I. In its Opinion below, the Sixth Circuit Court of Appeals ignored state law regarding what is necessary for an action of a state university to be deemed final for purposes of applying when a statute of limitation begins to run. The Court of Appeals refused to apply holdings of the Kentucky Appellate Courts and Kentucky Statutes regarding this issue despite its reliance on Kentucky law in determining that the statute of limitations was one year for claims under 42 U.S.C. § 1983. Accordingly, the granting of this Writ is necessary to correct the Sixth Circuit's decision to overstep its boundaries and ignore applicable state law.

II. Since the release of this Court's Opinion in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), subsequent cases, both state and federal, have

labored to correctly interpret and apply *Ricks'* holding, often resulting in inconsistent outcomes. Nowhere is this more apparent than in the Court of Appeals for the Sixth Circuit's Opinion in the present claim, in which it failed to follow *Ricks*, despite its belief that its holding was consistent and supported by *Ricks*. As a result, the granting of this Writ is necessary so that this Court can clarify its holding in *Ricks* to assure its correct application in the future.

III. In its Opinion entered on February 9, 2004, the Court of Appeals for the Sixth Circuit significantly departed from the accepted and usual course of judicial proceedings regarding a judgment on the pleadings by making and drawing conclusions of fact not found in the record. Because of this, it is necessary for this Court to exercise its supervisory power to correct the Court of Appeal's actions.

I. Certiorari is Warranted to Address the Sixth Circuit Court of Appeal's Disregard of Applicable State Law as well as it's Misapplication of *Delaware State College v. Ricks*.

a.) The Sixth Circuit Refused to Consider Kentucky Statutory and Case Law Addressing What Constitutes a Final Action of a State University.

State law provides the applicable statute of limitations for § 1983 claims. See *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). In Kentucky, it is one year. *Id.* In the present claim's context, a claim accrues when the employer takes a final action to deny tenure and communicates it to the affected party. *Delaware State*

College v. Ricks, 449 U.S. 250, 259 (1980). The issue that must be addressed is whether state law can be ignored by a federal court when determining what constitutes a "final action" of a state university.

In *Board of Trustees v. Hayse*, 782 S.W.2d 609 (Ky. 1989), Kentucky's highest court analyzed a set of circumstances almost identical to Haeberle's situation. Hayse, a University of Kentucky professor, filed an action alleging violations of 42 U.S.C. § 1983 and other laws as a result of his denial of tenure. *Id.* at 612. At issue was whether Hayse's claims were barred by the one year statute of limitations. *Id.* at 613. The Board of Trustees argued that the claim accrued when Hayse signed a one year terminal employment contract while Hayse contended that it was not until he was officially notified that he had been denied tenure. *Id.* The court agreed with Hayse, holding that the statute of limitation did not begin to run until the University made a final decision to deny tenure and communicated this decision to Hayse. *Id.*

The Kentucky legislature provides guidance as to when an action of a university is considered to be final and determinative. Under KRS §§ 61.805 and 61.835, a state university speaks through the minutes of its board of trustees. More specifically, the University of Louisville's Board of Trustees has broad decision-making powers regarding the University's employees, such as: appointment of all faculty members, including decisions regarding the compensation and duties of each and the suspension and removal of the president, officers, faculty and other personnel. See KRS § 164.830. It follows that a professor is not put on notice that he has been officially denied tenure until the Board of Trustees makes and communicates a final determination. This

is in accord with the Kentucky Supreme Court's holding in *Hayse*.

Despite this, the Sixth Circuit chose to ignore state law and instead find that Haeberle's cause of action began to accrue when the University's President made a negative recommendation, not when the Board of Trustees notified Haeberle that his tenure was denied.[1] The court doubted the relevance of *Hayse*, and opined that federal law, not state law, governs the time in which the state limitation period commences. Assuming *arguendo* that this is true, federal law merely applies the well-known rule that the limitations period begins to run when the plaintiff knows or has reason to know that the action that is the basis of the plaintiff's injury has occurred. *Collard*, 896 F.2d at 183. It does not address what action of the state university is considered its "final" action. State law controls such a determination.

This court has stated that in the context of § 1983 claims, state law not only determines the length of the limitation period, but also governs the application of the limitation period. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 454, 464 (1975) ("In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application"); *Chardon v. Fumero Soto,* 462 U.S. 650, 657 (1983).

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[1] Notably, had Haeberle brought his claim in state court at the time of the President's recommendation, it would have likely been found unripe as he had not yet exhausted his administrative remedies. See *Board of Regents v. Curris*, Ky. App., 620 S.W.2d 322, 323 (Ky. App. 1981).

It is imperative that this Court grant certiorari so that the Sixth Circuit's disregard of state law can be corrected. This Court has stated that in § 1983 actions, state law determines the application of the statute of limitations. Kentucky's Supreme Court and Legislature agree that a university's board of trustees possesses the power to take a final action for the University. Nowhere does Kentucky law state that the president of a university maintains this power, particularly upon the making of a mere recommendation. Accordingly, Haeberle respectfully requests this Court to grant certiorari so that this issue may be properly resolved.

b.) The Sixth Circuit, as well as several other appellate courts, have struggled to correctly interpret *Ricks*, resulting in a far too broad application of its holding.

As stated above, *Ricks* held that the statute of limitations began to run when the decision to deny tenure was actually made and the denied party was notified. 449 U.S. at 258. In its identification of the date in which notification occurred, the Court took several factors into consideration.

Specifically, this Court found the relevant date to be June 26, 1974, as this was the date in which the College's Board of Trustees advised Ricks that he had been denied tenure and that his employment would terminate on a specified date *Id.* at 261-62. This letter expressly stated that it was the Board's "official position." *Id.* at 261. The Court placed significant weight on the fact that prior to the June 26 letter which announced the Board's official position, Ricks had already received four negative recommendations and no positive recommendations regarding his tenure. *Id.* at 262. The court found that this "unbroken array of negative decisions" was sufficient to notify Ricks of the College's official decision.

Id. Significantly, the Court noted that limitation periods should not begin to run "so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." *Id.* at n. 16.

In Haeberle's situation, he was not informed by the University's Board of Trustees that he had been denied tenure and would have his employment terminated until March of 2000. Accordingly, March, 2000 was the date when the Board's "official position" was communicated to Haeberle. Prior to this, his application for tenure was still being reviewed and a final decision had not been rendered. In addition, the "unbroken array of negative decisions" present in *Ricks* did not occur in this matter as the School of Dentistry's Faculty Personnel Review Committee, the Dean of the University's School of Dentistry, and the University Faculty Grievance Committee had all recommended that Haeberle be awarded tenure. Accordingly, under a correct interpretation of *Ricks*, Haeberle's cause of action did not accrue until March of 2000. Instead, the Sixth Circuit misapplied *Ricks* in holding that Haeberle's claim accrued in September of 1999 when he received a hearing to review the President's negative recommendation.[2]

Ricks was an unusual opinion for this Court in that it was extremely fact-specific in its holding. In a subsequent Opinion, this Court reaffirmed *Ricks'* holding by stating that it stood for the proposition that the limitations period commences when the employee is actually denied tenure,

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[2] This holding contradicts the Sixth Circuit's prior opinion in *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 184 (6th Cir. 1990) in which it held that the statute of limitation did not begin to run until a final decision by an administrative board, namely, the Kentucky Board of Nursing.

rather than when his employment officially terminates. See *Lorance v. AT&T Technologies,* 490 U.S. 900, 906 (1989).

The Sixth Circuit inexplicably expanded *Ricks*' narrow holding by finding that Haeberle's limitation period commenced upon being notified of the President's negative *recommendation*, rather than the Board of Trustee's subsequent notification that his tenure had been denied. This holding directly contradicts the language in *Ricks* that a statute of limitation should not begin to run "so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n. 16. Haeberle could not reasonably be expected to realize that a possible cause of action began to accrue before he learned that his tenure had been denied by the Board of Trustees. The Sixth Circuit's holding is certain to cause uncertainty in future litigants when attempting to determine the commencement of the limitations period for § 1983 claims. Such a result was not intended by this Court when deciding *Ricks*.

Importantly, the Sixth Circuit is not the only appellate court to encounter difficulty correctly applying the holding of *Ricks*. In *Johnson v. General Electric*, 840 F.2d 132, 134 (1st Cir. 1988), overruled in part by *Clockdile v. New Hampshire Dep't of Corr.*, 245 F.3d 1, 4 (1st Cir. 2001), the commencement of a limitations period for the plaintiff's racial discrimination claim against his employer was in question. In its analysis, the court noted the struggle of appellate courts to apply the holding of *Ricks* in a variety of circumstances. *Id.* at 134.[3] In particular, the court stated:

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[3] See also *Sumner v. Goodyear Tire & Rubber Co.*, 398 N.W.2d 368, 379 (1986) ("However, *Ricks* also created a great

> The predominant question has concerned whether a claim accrues when an employee is made subject to an employment plan or evaluation (e.g., seniority status or a mandatory retirement age or a subjective evaluation), or when that plan or evaluation is applied to deny the plaintiff particular benefits or positions (e.g., a promotion or the award of a retirement pension). The issue can alternatively be framed as whether the *applications* of a discriminatory employment plan or evaluation constitute separate, cognizable discriminatory *acts* under *Ricks*, or whether they are merely consequences of earlier discriminatory acts. In other words, can the statute of limitations start running before there is certainty that *any* adverse employment decision disadvantaging the plaintiff will result from the discrimination?

Id. at 134-35. The court then proceeded to discuss the various ways in which *Ricks* has been applied by the Circuits. *Id.* at 135-136.[4]

It is apparent that appellate courts have experienced difficulty in correctly interpreting and applying the holding of this Court in *Ricks*. This is glaringly obvious in the Sixth Circuit Court of Appeals' decision in the present matter. Thus, Haeberle respectfully requests this Court to grant

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deal of confusion because the Court did not define exactly how it construed the denial of tenure).

[4] See e.g. *Lendo v. Garrett County Bd. of Education*, 820 F.2d 1365, 1367 (1987) (limitation period began to run when the Board of Education denied tenure, not when two earlier negative evaluations were given, because the Board could have still granted tenure despite the prior evaluations).

ceriorari so that it may clarify *Ricks* to prevent the further expansion and misapplication of its holding.

II. The Sixth Circuit's Significant Departure From The Accepted Course Of Judicial Proceedings In its Application of The Well-Established Standard For Judgments On The Pleadings Necessitates The Exercise Of This Court's Supervisory Power.

The Sixth Circuit reviews a Motion for Judgment on the Pleadings *de novo*. *Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir. 1998); *EEOC v. J. H. Routh Packing Company,* 246 F.3d 850 (6th Cir. 2001). The standard of review is identical for a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Accordingly, the court must "construe the complaint in a light most favorable to plaintiff, accept all the complaints' factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims it would entitle relief." *Id.* (citing *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir. 1990).

Likewise, the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. (See F.R.C.P. 8(a)). The Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 2 L.Ed. 2d 80, 78 S.Ct. 99 (1957).

In the present matter, the Sixth Circuit significantly departed from the well-established standard for judgments on the pleadings. Based on the pleadings, the Faculty Grievance Committee held a hearing on September 7, 1999 to review the

President's negative recommendation to the Board of Trustees regarding Haeberle's tenure. The Committee recommended that the President reconsider his recommendation. The President chose to affirm his negative recommendation. The Board of Trustees then notified Haeberle in March of 2000 that his tenure was denied and that his employment would be terminated. Haeberle filed a lawsuit on December 21, 2000.

In determining that Haeberle's claims were barred by the one year statute of limitation, the Court of Appeals stated the following:

> The actual date on which the University first informed Haeberle of the tenure denial is unclear. We do know, however, that Haeberle appealed the President's decision by filing a grievance with the Faculty Grievance Committee. The committee held a hearing on this appeal on September 7, 1999. Thus, the University *must* have notified Haeberle of the tenure denial sometime before September 7, 1999. After its hearing, the Faculty Grievance Committee recommended that the University should reconsider its decision and grant tenure. Despite the recommendation, the Board of Trustees refused to grant tenure and notified Haeberle of this decision on March 1, 2000. (emphasis added).

The court then used September 7, 1999 as the date in which Haeberle's cause of action began to accrue.

Clearly, the Court of Appeals made factual determinations and conclusions outside of the facts stated in the pleadings. Based on the pleadings, the only event that had occurred by September 7, 1999 was the President's negative recommendation regarding tenure. The University's official

action did not take place until March 1, 2000 when the Board notified Haeberle of its decision. Courts must assume that the decision-making hierarchy for state universities set out by the Kentucky legislature is not a sham and that a negative recommendation by a University President does not foreclose the possibility that the Board of Trustees will still grant tenure.

This Court should exercise its supervisory power as a result of the Sixth Circuit's significant departure from the accepted standard for judgments on the pleadings. Accordingly, Haeberle respectfully requests this Court to grant certiorari to correct the error of the lower court as well as to reaffirm and clarify the proper standard of review for judgments on the pleadings.

CONCLUSION

For the foregoing reasons, Petitioner, Clarence B Haeberle, requests that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit's decision not only undermines the authority of the Kentucky Legislature and judicial system in establishing rules for the finality of agency or unity action, but its decision conflicts with its own rulings with regard to the finality of these actions.

Further, the Sixth Circuit's opinion here sets dangerous precedent in its application of the rules for judgment on the pleadings. The dissent in the Sixth Circuit's opinion pointed out the majority's misapplication of the rules for deciding and reviewing a judgment on the pleadings and its seemingly development of facts not found in the record or viewed in a light most favorable to Haeberle. When the statute of limitations begins to run is an issue of extreme importance to

potential litigants. The Sixth Circuit leaves the issue of when to begin running the statute of limitations as a moving target encouraging litigants to file lawsuits early, when in fact, simply following the procedures laid out by their public institution might ultimately resolve the issue in a fashion which would not necessitate litigation. Public policy dictates that such an unwieldy rule not exist and this Court should grant the Petition for Writ of Certiorari to review these issues so that the opinion in *Ricks* and the standard for judgment on the pleadings are clarified and properly applied.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 02-5643

[Filed February 6, 2004]

CLARENCE BRENT HAEBERLE,
Plaintiff-Appellant,

v.

UNIVERSITY OF LOUISVILLE, JOHN W. SHUMAKER, JOEL A. KAPLAN, CAROL Z. GARRISON, MARIE K. ABRAMS, ULYSSES L. BRIDGEMAN, JR., ANN FORD COBB, JASON T. FRENCH, NATHANIEL E. GREEN, DENNIS R. HALL, FRANK B. HOWER, JR., ROSE MARIE LEGE, MILTON M. LIVINGSTON, JESSICA S. LOVING, WILLIAM P. MULLOY, SR., DARRYL T. OWENS, J. CHESTER PORTER, T.W. SAMUELS, SR., JOYCE HAGAN SCHIFANO, MELISSA LONG SHUTER, SANDRA METTS SNOWDEN, and MARY A. YARMUTH,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; GWIN, District Judge.* JULIA SMITH GIBBONS, Circuit Judge, concurring. JAMES S. GWIN, United States District Judge, concurring in part and dissenting in part.

OPINION:

PER CURIAM. Plaintiff Clarence Brent Haeberle appeals the district court's grant of judgment on the pleadings in favor of the defendants, University of Louisville, et al. ("the University"). In response to an allegedly unlawful denial of his tenure application, Professor Haeberle had raised a variety of federal and state-law claims against the University. The district court granted the University's motion for judgment on the pleadings with respect to the federal claims, finding them to be time-barred under Kentucky's one-year statute of limitations. The district court then remanded the state common-law claims to the Kentucky state court. The central question for this panel to determine is when the limitations period began to run. As the pleadings conclusively demonstrate that Haeberle's cause of action accrued more than a year before he filed his complaint, we affirm the district court.

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On July 1, 1987, the University hired Haeberle as a clinical instructor in the Department of Prosthodontics, which

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

is part of the University's School of Dentistry. On October 1, 1992, Haeberle became a full-time assistant professor. Like many assistant professors, Haeberle aspired to become a fully tenured professor. The guidelines for tenure were set out in the University's "Red Book," which listed some of the factors that university officials may take into consideration in deciding whether to grant tenure. Allegedly relying on these guidelines, Haeberle consciously tailored his professional and scholarly activities to maximize his chances for attaining tenure. These efforts included publishing several articles and making numerous presentations around both the state and the nation.

In August 1998, Haeberle submitted his application for tenure. The Dental School's Faculty Review Committee reviewed the application and recommended that he be granted tenure. The Dean of the Dental School agreed with the recommendation and forwarded it to Joel Kaplan, the University's Vice President for Health Affairs. Kaplan disagreed, however, and recommended that Haeberle be denied tenure because of the inadequacy of his research and publications. Kaplan forwarded his recommendation to the University's Provost, Carol Garrison. She agreed with Kaplan, and passed her negative recommendation (along with Kaplan's) to University President John Shumaker. Shumaker agreed with their assessment and notified the Board of Trustees that tenure would be denied and that Haeberle's employment would be terminated on March 31, 2000. According to the University's answer to the complaint and its concessions made at oral argument, the Board apparently did not take specific action on President Shumaker's notification that Haeberle would be denied tenure.

The actual date on which the University first informed Haeberle of the tenure denial is unclear.[1] We do know, however, that Haeberle appealed the President's decision by filing a grievance with the Faculty Grievance Committee. The committee held a hearing on this appeal on September 7, 1999. Thus, the University must have notified Haeberle of the tenure denial *sometime before September 7, 1999.* After its hearing, the Faculty Grievance Committee recommended that the University should reconsider its decision and grant Haeberle tenure. Despite the recommendation, the Board of Trustees refused to grant tenure and notified Haeberle of this decision on March 1, 2000.

On December 21, 2000, Haeberle filed an action in Kentucky state court. The case was subsequently removed to federal district court upon the University's request. In his initial complaint, Haeberle alleged that the University violated his due process rights under both the Fourteenth Amendment and § 2 of Kentucky Constitution. He also alleged, under 42 U.S.C. § 1985, that the defendants conspired to deprive him of his due process rights. The University filed a motion for judgment on the pleadings on April 17, 2001. Haeberle responded by filing an amended complaint on May 14, 2001 (which was accepted and filed by the district court on August 6, 2001).

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[1] In one of the motions filed in the district court, the University attached a letter from Shumaker dated February 22, 1999, which informed Haeberle of the tenure denial. This letter, however, cannot be considered on appeal because it was not part of the original complaint filed by Haeberle. In a motion for judgment on the pleadings, this court may only look at the pleadings themselves and exhibits "incorporated by reference into the complaint." *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); Fed. R. Civ. P. 12(c).

In the amended complaint, Haeberle reaffirmed every allegation of the initial complaint. He also added a number of new federal claims, including violations of his freedom of association and equal protection rights. Specifically, Haeberle alleged that he was punished for associating with unnamed Dental School officials. He also claimed that the University violated his equal protection rights by granting tenure to a woman with equal credentials. Finally, Haeberle raised tort and contract claims under state law.

The district court rejected the claims in Haeberle's first complaint on November 5, 2001, while explicitly reserving judgment on the claims of the amended complaint. In rejecting the first complaint, the district court relied on a variety of grounds. For example, it rejected the § 1983 damages claims (with respect to certain defendants) on the basis of state sovereign immunity. With respect to Haeberle's request for injunctive relief pursuant to § 1983 and the state due process claim, the district court held that Haeberle had no property interest in the grant of tenure absent a state law or express contract.[2] The district court also dismissed the § 1985 claim because Haeberle failed to allege any "class-based discriminatory animus." All of the claims raised in the first complaint were dismissed on the merits.

The district court rejected Haeberle's amended complaint on April 22, 2002. In a shorter opinion, the district court granted the University judgment on the pleadings with respect to all of the federal claims (raised pursuant to § 1983) because they were time-barred by the one-year statute of limitations in

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[2] This reasoning also applied to Haeberle's claims for money damages against Kaplan, Garrison, and/or Shumaker in their individual capacities.

Kentucky. The district court declined to grant judgment to the University with respect to the state-law tort and contract claims, choosing instead to remand them back to the Kentucky state court. Haeberle timely appealed the decisions from both of the opinions.

II

"The standard of review applicable to a motion for judgment on the pleadings under Fed. R. Civ. Pro. 12(c) is the same *de novo* standard applicable to a motion to dismiss under Rule 12(b)(6)." *Ziegler v. IBP Hog Market*, 249 F.3d 509, 511-12 (6th Cir. 2001).

For § 1983 actions originating in Kentucky, this court has held that the applicable statute of limitations is one year. *Collard v. Kentucky Bd of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990) ("Accordingly, we conclude that section 1983 actions in Kentucky are limited by the one-year statute of limitations found in section 413.140(1)(a)."). The statute of limitations "begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996). The only material question in this case is whether Haeberle's federal claims (filed on December 21, 2000) were filed within one year from the time he knew or should have known about the University's decision to deny him tenure. Accordingly, our conclusion depends solely on *when* the cause of action accrued. The University contends that the statute of limitations commenced at some point prior to September 7, 1999, when the Faculty Grievance Committee held its hearing. Appellees' Brief at 15. Haeberle maintains that the appropriate date is March 2000, when the University denied Haeberle's administrative appeals. Appellant's Brief at 17.

The Supreme Court addressed this very question in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). In *Ricks,* the Court held that in cases involving tenure denials, courts should apply the date the plaintiff was notified of the tenure denial, and *not* the date marking the end of the grievance (i.e., administrative appeal) process.

> We conclude . . . that the limitations period commenced to run when the tenure decision was made and [plaintiff] was notified. . . . The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made. . . . [We also conclude] that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period.

Id. at 259, 261 (emphasis in original). Focusing strictly on the dates provided in Haeberle's pleading, we know that the University *must* have notified Haeberle prior to the September 7, 1999, hearing in which Haeberle (by his own words in the complaint) "appealed his denial of tenure." Complaint, P 31. Haeberle filed his original complaint on December 21, 2000, more than a year after the date of the hearing. Because *Ricks* controls, Haeberle's late filing would normally mark the end of our discussion. Haeberle, however, raises several arguments as to why the district court erred in finding his federal claims to be time-barred. We address each argument in turn.

III

A

First, Haeberle argues that, in granting the University judgment on the pleadings, the district court erroneously considered a letter from President Shumaker that was extrinsic to the pleadings. Specifically, Haeberle claims that the district court made its decision "based upon [the February 1999] letter attached to a Reply Brief filed by Defendants below." Appellant's Brief at 18. In the letter, dated February 22, 1999, Shumaker informed Haeberle that his application for tenure had been denied.

On a motion for judgment on the pleadings, this court may only look at the pleadings themselves and exhibits "incorporated by reference into the complaint." *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); Fed. R. Civ. P. 12(c). The letter was clearly not a part of pleadings, nor was it referenced in Haeberle's complaint.

The district court's opinion, however, never mentioned the letter. In fact, the district court relied specifically on the September date included in Haeberle's complaint to reach its conclusion. ("The plaintiff's complaint reveals that he was notified that the Board of Trustees had denied his application for tenure sometime before September 7, 1999."). Haeberle's first argument lacks merit.

B

Second, Haeberle avers that this court should apply the March 2000 date because the University's action was not yet final, or alternatively, because the University failed to abide by its internal tenure procedures when it rejected his tenure

application. In making this argument, Haeberle relies on a series of regulations in § 4.1.5(H)(6)-(12) in the Red Book ("Acquisition of Tenure"). Essentially, Haeberle contends that the regulations required the Board to make a final decision after it received the negative recommendation from President Shumaker. Because the Board never acted, Haeberle claims that the University's action (prior to March 2000) should not be considered "final" under the applicable Red Book regulations.

Haeberle, however, misreads the Red Book regulations, which read, in part, as follows:

> (7) The President shall make the final recommendation concerning tenure for any faculty member whose status is to be acted upon by the Board of Trustees and shall inform the Board concerning the nonrenewal of contract for any faculty member completing the sixth year of service counted toward tenure.
>
> . . .
>
> (9) The Board of Trustees shall take final action to grant tenure after an *affirmative* recommendation by the President. In addition, in any case where the initial recommendation to deny tenure is by the *President,* the Trustees shall decide whether to grant tenure after considering the President's original recommendation, the Report of the Faculty Grievance Committee and the response of the President and the candidate.
>
> . . .
>
> (11) Faculty members not recommended for tenure shall be informed by the President within seven days

after the decision has been *reported to* the Board of Trustees.

The first problem with Haeberle's reading of the regulations is that many of them apply *only* when the *President* makes the initial negative recommendation. In this case, however, *Vice-President Kaplan* made the initial recommendation. A second problem is that the regulations never state that the Board must ratify the President's *negative* recommendation when the initial negative recommendation comes from someone other than the President. Instead, § 9 requires the Board to act after either an *affirmative* recommendation, or when the initial negative recommendation comes from the President. If Haeberle's interpretation of the regulations were correct, meaning that all recommendations required Board action, much of the language in § 9 would be superfluous.[3]

In light of the text of the regulations, we find that the Board was not required to act after President's Shumaker's negative recommendation. Accordingly, the notification by President Shumaker, which happened at some point prior to September 7, 1999, was sufficient to provide Haeberle with notice of his alleged injury. To hold otherwise would suggest that Haeberle could have remained employed indefinitely so long as the Board never acted, despite the President's negative recommendation. Thus, even assuming these regulations were part of the pleadings (which is questionable), Haeberle's argument fails.

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[3] We note that although § 7 requires the President to offer a recommendation for any candidate "whose status is to be acted upon by the Board," it provides no guidance as to when the Board must act.

C

Third, although Haeberle concedes that the statute of limitations question is one of federal law, he contends that the district court should have looked to Kentucky law in order to determine when the University's decision was final. Appellant's Brief at 22-27. The argument is that because the University is a "creature of the state of Kentucky," it is therefore "subject to the interpretations of the Kentucky Supreme Court and the Kentucky legislature" with respect to the finality of state entity decisions. Thus, according to Haeberle, the Kentucky Supreme Court's decision in *Board of Trustees of University of Kentucky v. Hayse*, 782 S.W.2d 609 (Ky. 1989), requires this court to find that the University's actions in 1999 should not be considered final.

First, it is not clear that *Hayse* is even relevant to the statute of limitations question. In *Collard v. Kentucky Board of Nursing*, this court explained that "federal law and not state law is relevant for the purpose of characterizing a section 1983 claim. Accordingly, federal law governs the question of when that limitations period begins to run." 896 F.2d 179, 183 (6th Cir. 1990) (internal citations omitted) (quoting *McCune v. City of Grand Rapids*, 842 F.2d 903, 905 (6th Cir. 1988)).

Even assuming *Hayse* is relevant, it does not support Haeberle's position. In *Hayse*, a professor at the University of Kentucky applied for tenure during the 1976-77 academic year, but the school rejected his application. 782 S.W.2d at 611. The professor then signed a contract, in February 1977, that provided him with a one-year "terminal appointment." Id. at 611, 613. The professor filed a second application for tenure the next academic year, but the university rejected his application in May 1978. The Kentucky Supreme Court had

to decide when the statute of limitations period began. The court held that the professor's cause of action accrued in May 1978, and not February 1977. *Id.* at 613.

It is not completely clear how Haeberle thinks *Hayse* should be applied in this case. On the one hand, Haeberle might be suggesting that *Hayse* stands for the proposition that no action by a Kentucky university is final until the Board of Trustees acts in accordance with proper regulations. In *Hayse,* however, the Kentucky Supreme Court merely repeated a lower court's finding that, under the University of Kentucky's regulations, the Board of Trustees had final authority "to approve or disapprove" an application for tenure. *Id.* at 611. It did *not* declare a general rule that all decisions regarding tenure by all Kentucky universities must come from their Boards of Trustees. If anything, *Hayse* undermines Haeberle's position. The *Hayse* court ultimately found that the plaintiff's cause of action accrued on May 5, 1978 (the date of the second tenure denial), even though the Board of Trustees had not acted upon his application for tenure. *Id.* at 612, 613. Regardless, unlike the University of Kentucky's regulations in *Hayse,* the University of Louisville's regulations did *not* require the Board to act on negative recommendations.

Alternatively, Haeberle might be citing *Hayse* for the more limited proposition that a university's action must be final before a plaintiff can possibly have notice of the act that initiates the limitations period. Even assuming Haeberle's reading is correct, we have already concluded that the President's negative recommendation represented a final decision for purposes of determining when Haeberle's cause of action accrued.

D

Fourth, Haeberle suggests that the district never overruled its earlier opinion in its second opinion. Presumably, the argument is that because the first opinion dismissed the federal claims on reasons not related to the statute of limitations, and because the second opinion did not clearly overrule the first opinion, this court should review those federal claims that were not explicitly dismissed as untimely. Because we find that our reasoning is equally applicable to the federal claims dismissed in the November 5, 2001 order, we do not need to discuss the bases on which the district court relied in its November 5 order.

E

Finally, there has been considerable confusion as to whether the Board responded in any way to Shumaker's negative recommendation in 1999.[4] The University's position has been extremely contradictory and unclear on this question. For example, in some of its filings in the district court, the University seemed to claim that the Board did act upon Shumaker's recommendation.[5] Likewise, in its brief to this court, the University seemed to suggest that the Board had acted upon Shumaker's recommendation in 1999. Appellant's Brief at 7-8. Yet, in its initial answer to the complaint, the University denied Haeberle's allegation that the Board rejected his tenure request in 1999. *Compare* J.A.

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[4] Haeberle conceded that the Board notified him in March 2000 that it had rejected the recommendation of the Faculty Grievance Committee and denied him tenure. Appellant's Brief at 10-12.

[5] Haeberle, however, denied that the Board had acted, as it was allegedly required to do under Red Book regulations.

22 (PP 30-31) *with* J.A. 40 (PP 35, 37). In addition, the University, in a different section of its brief to this court, explained that in situations where the President does not make the initial negative recommendation, "the Board of Trustees takes no action." Appellant's Brief at 17.

Despite the University's lack of clarity, Haeberle's claims are time-barred. If the Board did in fact act in 1999, then Haeberle's claims are clearly time-barred. Even if the Board did not act in 1999, we still conclude (for reasons stated above) that the President's recommendation constituted a final decision in light of the language of the University's regulations. We emphasize, however, that we find the President's decision to be "final" only for purposes of determining the proper statute of limitations period for Haeberle's § 1983 claims. We express no opinion on the issue of finality with respect to the state law questions.

IV

For the reasons set forth above, the judgment of the district court is AFFIRMED. The plaintiff's federal claims will be DISMISSED and the two remaining state-law tort and contract claims raised in the amended complaint will be REMANDED to the state court.

CONCURBY:

JULIA SMITH GIBBONS; JAMES S. GWIN (In Part)

JULIA SMITH GIBBONS, Circuit Judge, concurring. I concur in Judge Boggs's opinion and agree that, based on *Ricks,* the one-year Kentucky statute of limitations bars Haeberle's federal claims. I write separately to note my

understanding of the proper record before us and its effect on the result.

With regard to the record, the portions of the Red Book referred to in Part III.B of Judge Boggs's opinion are not a part of the pleadings. The only portions of the Red Book found in the pleadings are those relating to criteria for tenure decisions, which are attached to plaintiff's original complaint. It is thus difficult for me to see how the remainder of the Red Book can be considered incorporated by reference into the pleadings, and in my judgment it is not a proper part of the record. In any event, however, the Red Book provisions and their interpretation are not pertinent to the result. In fact, Judge Boggs's opinion (which recognizes that these Red Book provisions may not be part of the pleadings) does not rest on an interpretation of the Red Book, but mentions the Red Book only in explaining why Haeberle's argument concerning its provisions lacks merit.

The key to this case is not the Red Book or the precise procedure followed by the University or whether the President's recommendation was a final decision. Rather, the result is determined by the undisputed facts that on September 7, 1999, the Faculty Grievance Committee held a hearing regarding the recommendation that Haeberle be denied tenure and that Haeberle was aware of the recommendation before that date. Under *Ricks,* it makes no difference whether we characterize this proceeding before the Faculty Grievance Committee as an appeal of a denial of tenure, as plaintiff does in his complaints, or as pursuit of a grievance, which is the language used by defendants in their answers. Under either description, plaintiff was pursuing the administrative process for obtaining a tenure decision that differed from that recommended by university administrators and communicated to Haeberle prior to September 7, 1999. He was clearly

seeking review of a non-tentative decision (whether called a recommendation or something else) rather than trying to influence initial decision-making about whether he should receive tenure. *See Ricks*, 449 U.S. at 261.

In addition, the conclusion that Haeberle's federal claims are time-barred is reinforced by the fact that Haeberle's complaints allege federal constitutional violations based on the university administrators' recommendation, not any later decision-making by the Board or other individuals or entities. J.A. at 22-24, 79. Thus, the focus of the limitations inquiry on the federal claims must be the date when Haeberle learned of the allegedly unconstitutional acts, not the date when he learned of some other action. *See Ricks*, 449 U.S. at 258 & n.9; *cf. Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981) (stating that the limitations inquiry must focus on the timing of the acts alleged to be illegal and not subsequent acts); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059 (9th Cir. 2002) (same); *Taylor v. Gen. Motors Corp.*, 826 F.2d 452, 456 (6th Cir. 1987) (same).

DISSENTBY:

JAMES S. GWIN (In Part)

JAMES S. GWIN, United States District Judge, concurring in part and dissenting in part.

Respectfully, I concur, in part, and I dissent, in part. As described below, I believe the Court reaches the correct result regarding Haeberle's due process and First Amendment claims, although not because he failed to file this action within the statute of limitations. Instead, I find that he fails to show a protected interest in continued employment. With regard to the Court's discussion of the application of the statute of

limitations to Haeberle's claims, I believe the Court's opinion is wrong regarding two important issues. First, in a case that was thrown out before the parties started discovery, the majority opinion misapplies the law applicable to motions for judgments on the pleadings under Rule 12(c). Second, it applies the wrong accrual rule for § 1983 claims. I explain my reasons below.

Rule 12(c) Standard

Traditionally, courts have notably hesitated to grant motions for judgment on the pleadings. 5A Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1368, at 517 n. 1 (1990). For good reason, too; Rule 12(c) carries a difficult standard for moving parties to meet. 5A Wright & Miller, *Federal Practice & Procedure 2d* § 1368, at 705-06 (2003 Supp.).

Courts apply the same analysis to motions for judgment on the pleadings under Rule 12(c) as they apply to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). When faced with a defendant's motion for judgment on the pleadings, a district court must "construe the complaint in the light most favorable to the plaintiff [and] accept all of the complaint's factual allegations as true." *Id.* (citations omitted); *see also Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999).

The district court may grant the defendant's motion for judgment on the pleadings only if "the plaintiff *undoubtedly* can prove *no set of facts* in support of the claims that would entitle relief." *J.H. Routh Packing Co.*, 246 F.3d at 851 (citations omitted) (emphasis added). If any issue of material fact cannot be resolved on the pleadings, judgment on the

pleadings is improper. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002); *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 514 (7th Cir. 1999). Therefore, a "defendant will not succeed on a motion under Rule 12(c) if there are allegations in plaintiffs pleadings that, if proved, would permit recovery." 5A Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1368, at 527-28 (1990). The same standard applies to this Court, as we apply the *de novo* standard of review to district courts' decisions on motions for judgment on the pleadings. *J.H. Routh Packing Co.*, 246 F.3d at 851.

The majority omits the substance of this standard. Instead, it states only that in reviewing a decision on a Rule 12(c) motion, we apply "the same *de novo* standard applicable to a motion to dismiss under Rule 12(b)(6)," and that a court "may only look at the pleadings themselves and exhibits 'incorporated by reference into the complaint.'" *Supra* (citing *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)). The majority ignores the requirement that a party moving for judgement upon the pleadings needs to show the plaintiff "undoubtedly can prove no set of facts in support of the claims that would entitle relief." *J.H. Routh Packing Co.*, 246 F.3d at 851. But more important than the majority's discussion of the Rule 12(c) standard. I disagree with the majority's application of the Rule 12(c) standard to the facts of this case.

§ 1983 Accrual

Causes of action filed under 42 U.S.C. § 1983 accrue when the plaintiff knows or has reason to know of the injury which is the basis of the § 1983 action. *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991) (citing *Sevier v Turner*, 742 F.2d 262, 272 (6th Cir. 1984)): *see also Gentry v.*

Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). Here, Haeberle alleges that the University improperly denied him tenure. Therefore, his action accrued on the date when he knew or should have known that the University denied his request for tenure.

The majority concludes that because the University held a hearing regarding a negative tenure decision on September 7, 1999, Haeberle's claim must have accrued by that time. To reach this conclusion, the majority states that regardless of the labels attached to both the decision that prompted the hearing and the hearing itself, Haeberle knew that a constitutional right had been violated and that it was time to go to court to protect his rights. I cannot agree with this analysis.

Haeberle would not know that a constitutional violation occurred until the University rendered a decision that put him on notice that it decided the tenure issue. For this reason, the label placed upon the decision that prompted the grievance procedure is crucial. If in September 1999, Haeberle appealed a negative *recommendation,* then clearly he would not be under the impression that his rights had already been violated and that the time to rush to the courthouse had arrived. That is not the case if in September 1999, he appealed a negative *determination.* A determination is tantamount to an action; a recommendation is not. In other words, recommending that someone violate the Constitution is not sufficient to constitute a violation; only undertaking an action that violates the Constitution causes the action to accrue. Further, what we're really interested in is the time at which someone *should have reasonably known* of a constitutional violation, which is all the more reason that a recommendation is insufficient.

Looking solely at the pleadings, as I must at this stage,[1] I

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[1] When reviewing a motion for judgment on the pleadings, a court may only look at the pleadings themselves and exhibits incorporated by reference into the complaint. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (internal quotations omitted). The University's manual for tenure applicants--the "Red Book"--is not incorporated into the complaint. Instead, it was offered as an exhibit attached to the Plaintiffs' response in opposition to the defendants' motion for judgment on the pleadings. (J.A. at 58-75). For this reason, the Red Book is not part of the record, and it should not be considered or discussed in our disposition of the case.

Even if the Red Book were properly before the Court, however, I would still conclude that dismissing Haeberle's claims for violating the statute of limitations was in error. As I read the Red Book's contents, no decision on a tenure application is complete until the Board acts upon it. The only provision that allows a University President to deny a professor's application for tenure is paragraph 10, which applies only when the applicant resigns from his position before the Board can act. J.A. at 75. Nor do I see any logic in reading this policy to require Board action only when the President recommends granting tenure or is the first to recommend denying tenure. Such a reading would leave applicants such as Haeberle in a state of limbo. Further, such a reading turns the policy's language into doublespeak by permitting a negative *recommendation* to automatically' transform into a *denial*. If a negative recommendation from the President really is a denial, why go through the charade of calling it a "recommendation"?

Additionally, Kentucky law supports this reading of the Red Book. Kentucky Rev. Stat. § 164.821(1) vests authority to govern the University of Louisville in the Board of Trustees. The Board's powers include "[a]ppointment of . . . all faculty members." K.R.S. § 164.830(1)(a), and "removal of . . . faculty," K.R.S. § 164.830(1)(b). Nowhere is there any mention of a University president's power to appoint or remove faculty members, nor is there any mention of the Board's authority to delegate these tasks.

cannot tell what Haeberle appealed in September 1999. Haeberle's complaint does state that he "appealed his denial of tenure" at the September 7, 1999 grievance hearing. (J.A. at 22, P 31). However, the University's answer denies this allegation, admitting only that the grievance committee held a hearing. (J.A. at 40, P 37). The University further states that the Grievance Committee recommended that the defendants "reconsider their decision not to recommend promotion and tenure." (J.A. at 40. P 38) (emphasis added). This latter statement explicitly denies that the Grievance Committee reviewed any final decision or any action of the Board. Currently, the parties dispute the critical issue--whether Haeberle appealed a denial of tenure or a recommendation to deny tenure in September 1999,[2] without knowing the answer to this issue, it is impossible to know whether Haeberle should have known that it was time to go to court to protect his rights. And therefore, it is inaccurate to conclude that Haeberle could prove no set of facts that would entitle him to relief.

Alternatively, the majority says that Haeberle's claim must have accrued by September 1999 because Haeberle pursued a grievance procedure. It further states that as a matter of law, grievance procedures are not part of the tenure review process, but rather administrative procedures that can be invoked only after a final decision. In support of this proposition, it cites *Delaware State College v. Ricks*, 449

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[2] Unfortunately, the majority sloughs over this critical point of contention by stating, "We do know, however, that Haeberle appealed the President's *decision* by filing a grievance with the Faculty Grievance Committee" (emphasis added). Indeed, the pleadings contain sufficient evidence that Haeberle appealed only a negative tenure recommendation from the President, as opposed to a final tenure decision, to create a genuine issue of material fact.

U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). *Ricks'* holding, however, is far more limited, as the *Ricks* Court analyzed the grievance procedure *in that case* and did not create a blanket rule to apply to all grievance procedures in all cases.[3] *Ricks* involved a situation in which a university's Board of Trustees denied tenure to a professor, who then sought review of this decision through a grievance process. The Court faced the issue of when the professor's claim accrued under 42 U.S.C. § 1981, which carries the same accrual standard as § 1983. It concluded that the limitations period commenced "when the tenure decision was made and Ricks was notified." *Id.* at 259, 101 S. Ct. at 504. Its greater challenge, however, was to identify that date. One alternative the Court considered was the termination of the grievance procedure. Rejecting that date, the Court noted "that the Board of Trustees had made clear well before September 12 [the date the grievance procedure ended] that it had *formally* rejected Ricks' tenure bid. The June 26 letter [from the Board of Trustees to the professor] characterized itself as *the Board's 'official position.'*" *Id.* at 261, 101 S. Ct. at 505 (emphasis added).

The *Ricks* Court's analysis repeatedly emphasizes that the Board of Trustees already had voted formally to deny tenure to the plaintiff before the grievance process commenced. *Id.* at 252, 101 S. Ct. at 501; *id.* at 261, 101 S. Ct. at 505; *id.* at

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[3] Indeed, the language from *Ricks* that the majority quotes supports this conclusion. It states, "The grievance procedure, by its nature, is a *remedy* for a prior decision . . . ." *Ricks*, 449 U.S. at 261, 101 S. Ct. at 506. If the Supreme Court meant to speak generally about grievance procedures, as opposed to specifically about the particular grievance procedure at issue, then this passage would have read, "Grievance procedures, by their very nature, are remedies for prior decisions . . . ."

262, 101 S. Ct. at 506. In other words, *Ricks* involved a grievance procedure that challenged the Board's final decision. Therefore, this case is similar to *Ricks* only if Haeberle's grievance followed a clear decision to deny tenure by the University official or body given authority to make the decision. And as I explained above, the record is simply too opaque on this point for the Court to make such a determination.

In sum, the poor state of the record prevents me from concluding that there was no issue of material fact (as required by Rule 12(c)) regarding either (1) when Haeberle was denied tenure, or (2) when Haeberle knew or should have known that he had been denied tenure. Further, the disparate stories the parties' pleadings tell regarding what exactly Haeberle appealed in the grievance process suffice to create a genuine issue of material fact regarding when Haeberle knew or should have known of the denial. For these reasons, I think that the majority applied the wrong standards with regard to both appellate review of a motion for judgment on the pleadings and accrual of a § 1983 action.

The district court should not have granted judgment on the pleadings unless it could conclude that Haeberle could prove no set of facts that would entitle him to judgment. As a prerequisite to that conclusion, the district court would have to find that there was no issue of material fact whether Haeberle should have known prior to December 1999 that he had been denied tenure. In a case involving such an underdeveloped record, I do not think it is reasonable for the district court to so conclude.

Under Rule 12(c), district courts should not dispose of cases unless the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. Given the

ambiguity of the University's policies and the poor shape of the record, judgment on the pleadings on the statute of limitations was inappropriate. I respectfully dissent from the majority's ruling to the extent that it holds that Haeberle failed to file his claims within the applicable statute of limitations.

The Merits of Haeberle's Federal Claims

That said, I agree with the majority's disposition with regard to most of Haeberle's claims, but I do so on their merits (or lack thereof) rather than on the statute of limitations. Before the court are three federal claims: alleged violations of procedural due process, the First Amendment, and equal protection. I discuss each of these in turn.

The district court concluded in its first order granting judgment on the pleadings that the University was entitled to judgment on Haeberle's federal due process claim, reasoning that Haeberle lacked a cognizable property interest in his job. J.A. at 112. I agree with the district court's disposition of this issue, and would thus grant the University's motion for judgment on the pleadings with regard to Haeberle's federal due process claim.

A prerequisite for establishing a due process violation is that the plaintiff establish deprivation of a liberty or property interest. Here, Haeberle asserts that he possessed a property interest in his position with the University. The district court correctly concluded that Haeberle lacked a property interest in his job.

Courts look to state substantive law to determine property interests. *See Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 710, 47 L. Ed. 2d 405 (1976) (stating that property interests protected by the Due Process Clause "attain this constitutional

status by virtue of the fact that they have been initially recognized and protected by state law").

Kentucky law recognizes no property interest in continued employment for plaintiffs in Haeberle's position. *Ashley v. University of Louisville* involved a similar factual scenario-a professor who was denied tenure and then sued, alleging a denial of due process. 723 S.W.2d 866 (Ky. Ct. App. 1986). The court found that because plaintiff had "neither contract nor tenure" he "had no cause of action." *Id.* at 868. The implication of this statement is that the plaintiff could not demonstrate a property interest in his job because he did not have tenure or a binding contract and therefore, plaintiff failed to state a due process cause of action. Because Haeberle similarly lacked tenure or a binding contract, he did not have an interest in his job sufficient for him to state a cause of action for a denial of due process. For these reasons, I conclude that the district court properly dismissed Haeberle's federal due process claim.

Haeberle also asserts a violation of the First Amendment's guarantee of free association. In his Second Amended Complaint, he say's that he "has been punished for exercising his lawful right of association under the First Amendment of the U.S. Constitution by following of the standards set by the University . . . for his attainment of tenure, and associating with the officials therein." J.A. at 80-81. The district court did not address this claim on the merits.

Haeberle is correct that the First Amendment confers associational rights. Regardless, his allegations do not provide a basis for finding a violation of these rights. The Supreme Court has recognized the right to associate "for the purpose of engaging in those activities protected by' the First Amendment--speech, assembly, petition for the redress of

grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Haeberle fails to allege that he sought to associate with Dental School officials for any these protected purposes. He further fails to explain how the University's denial of tenure prevented him from associating with Dental School officials. For these reasons, I would therefore dismiss this claim as well.

Finally, Haeberle alleges that the University deprived him of equal protection of the laws by its alleged "unequal application of standards to Haeberle as opposed to others seeking tenure at the University who preceded him." Confusing use of prepositional phrases and independent clauses notwithstanding, I conclude that this allegation states a plausible equal protection cause of action under *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). There, the Supreme Court held that claimants need not assert membership in a protected class to establish a cause of action for an equal protection violation. Instead, they may establish a claim as a "class of one" by alleging differential treatment from others similarly situated where there is no rational basis for the difference. *Id.* at 564. Haeberle's Second Amended Complaint identifies an allegedly similarly situated ("virtually identical," says Haeberle) professor who received tenure. Although the complaint does not use the magic words "no rational basis for the difference," its substance conveys the same notion--that standards meant to be applied evenly were not and the decision-makers failed to justify their actions. For these reasons, I would allow this claim to survive the motion for judgment on the pleadings.

State Due Process Claim

The final issue the Court must address is whether we should remand Haeberle's due process claim under § 2 of the

Kentucky Constitution. Because I conclude that the district court properly dismissed this claim in its first order granting judgment on the pleadings. I agree with the majority that we should not remand it to the district court.

Section 2 of the Kentucky Constitution states in full: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The Kentucky Supreme Court has made clear that "Section 2 of the Kentucky Constitution is that part of our constitution which guarantees due process of law to our citizens." *Remote Servs. v. FDR Corp.*, 764 S.W.2d 80, 82 (Ky. 1989); *see also Commonwealth v. Reneer*, 734 S.W.2d 794, 804 (Ky. 1987) ("The *Bill of Rights* in our Kentucky constitution, § 2, guarantees citizens of the State of Kentucky procedural due process . . . .").

Kentucky courts have reviewed statutes for substantive due process under Section 2 similarly to how federal courts have applied the Fifth and Fourteenth Amendments Due Process Clauses. *See, e.g., Pigeons' Roost, Inc. v. Commonwealth*, 10 S.W.3d 133, 135, 46 8 Ky. L. Summary 1 (Ky. App. 1999) (noting that the same standard applies in § 2 cases as in federal Fourteenth Amendment due process cases). Kentucky courts have also used § 2 to review administrative agencies' actions to ensure compliance with procedural due process. *See Shockey Tours, Inc. v. Miller Transp., Inc.*, 984 S.W.2d 95, 98, 45 14 Ky. L. Summary 32 (Ky. 1998) ("Any parties whose rights are affected by the action of an administrative agency is entitled to due process in compliance with Section 2[.]"). In a case considering procedural due process claims presented under both § 2 and the Fourteenth Amendment, the Kentucky Supreme Court employed principles of federal due process jurisprudence to resolve both claims. *See Transp. Cabinet v. Cassity*, 912 S.W.2d 48, 51, 42 13 Ky. L.

Summary 18 (Ky 1996). Hence. *Cassity* suggests that the procedural due process analysis under Kentucky law is analogous to the procedural due process analysis under federal law.

As I explained above, Haeberle lacked a property interest in his job and could not state a valid due process claim. I conclude that the district court properly dismissed Haeberle's § 2 claim and therefore join the majority's conclusion that our remand order applies only to the contract and tort claims Haeberle asserts in his Second Amended Complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY,
LOUISVILLE DIVISION

Civil Action No. 01-44-JBC

[Decided April 29, 2002]

CLARENCE BRENT HAEBERLE, PLAINTIFF,

vs.

UNIVERSITY OF LOUISVILLE, ET. AL., DEFENDANTS.

JUDGES: JENNIFER B. COFFMAN, JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY.

OPINIONBY: JENNIFER B. COFFMAN

MEMORANDUM OPINION & ORDER

This matter is before the court upon the defendants' motion for judgment on the pleadings (No. 18). The court, having reviewed the record and being otherwise sufficiently advised, will grant the defendants' motion in part and deny it

in part and will remand the plaintiff's state law claims to Jefferson Circuit Court.

Factual Summary

On July 1, 1987 the plaintiff was hired as a clinical instructor with the Department of Prosthodontics at the University of Louisville School of Dentistry (the "University"). On October 1, 1992, he became an assistant professor. In 1998, he submitted an application for tenure to the University. On September 24, 1998, the University's Faculty Review Committee unanimously recommended that he be awarded a tenured position. Sometime before September 7, 1999, however, the University's Board of Trustees denied his tenure application and advised him that his employment with the University would terminate as of March 31, 2000.

After receiving notice that the Board of Trustees had denied his tenure application, the plaintiff appealed the Board's decision to the Faculty Grievance Committee, which heard the matter on September 7, 1999 and recommended that the Board reconsider its decision and award tenure to the plaintiff. Nevertheless, the Board refused to reconsider its decision and the plaintiff's employment terminated on March 31, 2000.

The plaintiff filed this action on December 21, 2000. In his second amended complaint,[1] he alleges that the defendants have violated his Freedom of Association and Equal Protection rights and have breached and tortiously interfered with his University contract. With respect to his federal

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[1] The court dismissed the claims in his first amended complaint on November 5, 2001.

claims, he contends specifically that the defendants violated his First Amendment rights by denying him tenure because of his association with certain, unspecified University officials. He also claims that the defendants violated the Fourteenth Amendment by granting tenure to a similarly situated female professor.

Analysis

The plaintiff's federal claims, raised pursuant to 42 U.S.C. § 1983, are untimely. The statute of limitations applicable to such claims is one year from the date the cause of action accrued. *See Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). Where, as here, the plaintiff claims that his tenure application was denied for discriminatory reasons, his cause of action accrues when the employer makes and communicates a final decision that he will not be granted tenure. *See Delaware State College v. Ricks*, 449 U.S. 250, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980); *EEOC v. UPS*, 249 F.3d 557, 561 (6th Cir. 2001). The plaintiff's complaint reveals that he was notified that the Board of Trustees had denied his application for tenure sometime before September 7, 1999. He did not, however, file this action within one year from that date. Therefore, his federal claims must be dismissed.

The plaintiff's citation to *Bd. of Trustees v. Hayse*, 782 S.W.2d 609 (Ky. 1989) is unpersuasive, as that case is not binding on this court. *See, e.g., Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). Moreover, *Hayse* is distinguishable because the plaintiff there filed his complaint within a year of receiving notice of the University's final decision not to grant tenure. *See id.* at 613. The plaintiff's argument that the University did not make a final decision here until it refused to reconsider its decision

denying him tenure is also unavailing. The portions of the University handbook submitted by the plaintiff do not show that the Board's initial decision denying tenure was not a "final" decision. The mere fact that the University has an internal grievance process by which the Board may be urged to reconsider its decisions does not mean that the Board's initial decisions lack finality. "Entertaining a grievance complaining of the tenure, decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to influence that decision before it is made." *Ricks*, 449 U.S. at 261. *Ricks* applies to § 1983 claims. *See, e.g., Kessler v. Bd. of Regents*, 738 F.2d 751, 754 (6th Cir. 1984).

Finally, the plaintiff was not required to exhaust the University's administrative remedies prior to bringing his § 1983 claims, *see Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 987, 152 L. Ed. 2d 12 (2002); *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), and the statute of limitations was not tolled during the time he pursued those remedies. *See Ricks*, 449 U.S. at 261.

As the court will dismiss the plaintiff's federal claims, the court will remand the plaintiff's two remaining state law claims to Jefferson Circuit Court pursuant to 28 U.S.C. § 1367(c)(3). *See Long v. Bando Mfg. of America, Inc.*, 201 F.3d 754, 761 (6th Cir. 2000). Accordingly,

IT IS ORDERED that the defendants' motion for judgment on the pleadings is **GRANTED IN PART** and **DENIED IN PART**. Insofar as it seeks judgment on the plaintiff's federal claims, it is granted; in all other respects, it is denied.

IT IS FURTHER ORDERED that the plaintiff's state law claims are **REMANDED** to Jefferson Circuit Court and the pretrial conference scheduled in Louisville on May 21, 2002 and the trial of this action are **CANCELLED**.

This the 25 day of April, 2002.

JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

APPENDIX C

42 U.S.C. §1983

§ 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

KRS § 61.805

§ 61.805. Definitions for KRS 61.805 to 61.850

As used in KRS 61.805 to 61.850, unless the context otherwise requires:

(2) "Public Agency" means:

(d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

KRS § 61.835. Minutes to Be Recorded -- Open to Public

The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.

KRS § 164.830

§ Powers of Board

(1) The board of trustees of the University of Louisville shall constitute a body, corporate, with the usual corporate powers, and shall possess all the authorities, immunities, rights, privileges, and franchises usually attaching to the governing bodies of Kentucky public higher educational institutions. Powers of the board shall include the following:

(a) Appointment of a president, all faculty members, and other personnel and determination of the compensation, duties, and official relations of each. No relative of a board of trustee member shall be employed by the university.

(b) Suspension or removal of the president, officers, faculty, agents, or other personnel that it is authorized to appoint, except that no president, professor, or teacher shall be removed except for incompetence, neglect of or refusal to perform his duty, or for immoral conduct and that the removal

shall be made in accordance with the procedures established by law for state institutions.